

THE ETHICAL COMPASS

The Globalized Practice of Law: Part Two

It's a Small World After All: Cultural Competence with Your International Brethren

By Elayne E. Greenberg

Globalization is a “force majeure” that is growing and shaping the practice of law.¹ As increasing numbers of New York lawyers represent clients in transnational and cross-border matters, many New York attorneys are welcoming the enriching perspectives that their international brethren bring to deal making and dispute resolution. However, culturally competent lawyers are also cognizant of how the different and sometimes disparate ethical obligations and values held by their colleagues from civil law countries are influencing and, at times, complicating their dispute resolution efforts. In the previous column, I discussed how our perceptions, communications and preferential modes for resolving conflict are culturally laden choices.



Continuing the discussion, in this column, I discuss how lawyers from civil and common law countries are inculcated with different culturally based ethical values that influence their participation in dispute resolution. First, I highlight how the different sources of law and the prescribed educational qualifications in the common and civil law systems have different cultural underpinnings that are the genesis of variant ethical behavior. Then, I explain how although the ethical codes of civil and common law countries both identify the core ethical concepts of professional independence, confidentiality and conflicts-of-interest, each code interprets these terms with divergent and culturally infused meanings.² References to two ethical codes, the ABA Model Code³ and the Council of Bars and Law Society of Europe Code of Conduct (hereinafter the CCBE Code)⁴ frame this comparison. Next, I hypothesize about how these different legal systems might influence an attorney's receptivity and preferences for certain dispute resolution processes. Finally, I conclude with recommendations about how, given these inherent value differences, you as an attorney might achieve cultural symmetry with your international colleagues and create more effective and responsive dispute resolution options.

Allowing a meta perspective on the cultural underpinnings of ethical behavior, note that a lawyer's ethical behavior is, in part, influenced by the source of law in a lawyer's legal system of origin. Civil and common law regimes have fundamentally different sources of law, and each legal regime relies on these sources of law in very dif-

ferent ways. Civil law is codified, with the source of law coming from statutes, administrative law, and custom.⁵ In contrast, our common law system is considered an uncodified legal system in which our sources of law emanate from a mix of judicial decisions, customs, and statutes.⁶ In the common law system, sources of law are often regarded as flexible tenets that are often interpreted broadly. Following a different perspective, the civil law system reveres and preserves its code by requiring close interpretation to the code's original intent while shunning the concept of judicial precedent. Therefore, whether lawyers regard the law as either malleable and responsive or static and part of a long-held tradition depends on whether their legal system of origin was the common law or civil law.

Another explanation for the cultural divergence is that lawyers from civil and common law regimes receive different legal education, legal training, and legal skill sets that shape lawyers' values and perceptions about ethical behavior and effective advocacy. As lawyers from common law systems, we earn the right to be called a “lawyer” only after completing a graduate-level legal education and passing the bar. We then become part of a “unitary” profession that allows us to practice in a variety of legal areas and roles, including service as a judge.⁷

In direct contrast to our familiar common law approach, lawyers in civil law systems receive their legal education as part of their undergraduate education. Their legal education focuses on the theory of law and does not teach advocacy skills. Instead, aspiring lawyers learn lawyering skills by serving as apprentices after completing their undergraduate training. As part of their undergraduate education, aspiring lawyers decide which career track they will pursue: public prosecutor, government lawyer, judge, advocate, or notary.⁸ Once an aspiring lawyer elects a track, it is difficult to change.⁹ Again, how different this is from our U.S. legal education, where we are taught the theory and skills necessary to advocate as a lawyer in a diverse spectrum of practice areas. So we see, to the surprise of some, that even the label “lawyer” has different meanings, different statuses, different educational requirements, and different career trajectories depending on whether you are a lawyer from a civil or common law system.

Looking at another difference that shapes ethical behavior, judges from civil law and common law legal regimes have different career trajectories and roles that influence attorneys' advocacy and create different expect-

tations about fairness and justice. In our common law system, service as a “judge” is a high honor awarded to lawyers who have advanced in their legal careers and won the respect of their brethren. As we know all too well, judges who practice in common law regimes have “broad interpretive powers,”¹⁰ and in fact, distinguish themselves by using these broad interpretive powers to re-interpret precedent and create new case law. However, judges in the civil law system are civil servants and do not have the stature accorded to judges in the common law system.¹¹ Rather, civil law judges are considered to be “expert clerks” taking evidence and rendering decisions based on the existing statutes, void of interpretation or discretion.¹² There is no *stare decisis* and judges may arrive at different interpretations of the same source of law. The priority is honoring the code. In fact, judges practicing in civil law regimes role seek *verita processuale* or “procedural truth.”¹³ Of course, lawyers advocate differently in these two distinct legal systems. Unlike their common law counterparts, civil lawyers defer to judges, providing them upfront with all the evidence they need to make a decision without discovery or flamboyant advocacy.

If we consider a legal system’s ethical code as a memorialization of the legal culture, the ABA Model Rules and the CCBE are representative ethical codes of the common and civil law regimes, embodying culturally prescribed behaviors for lawyers practicing in each respective legal culture. The idiosyncratic preferences of each legal regime are reflected in the very way the codes are drafted. While the ABA Model Rules speak in terms of rules, the civil law ethic codes¹⁴ refer to more general articulated standards and norms. Although both ethic codes appear to articulate similar core values such as professional independence, confidentiality, and conflict-free representation, the actual interpretation of these words and the order in which they are prioritized are different and require a more nuanced understanding of the legal system and broader culture in which they live.¹⁵

Professional independence is one ethical value that has divergent meanings in each system. In the U.S., the professional independence of lawyers signifies that the profession is self-regulating instead of regulated by the government.¹⁶ However, professional independence in civil law systems refers to the lawyer’s “independence and autonomy from the client.”¹⁷ The CCBE Code reinforces that a lawyer’s professional independence is central to her role as a member of the legal profession and a free society.¹⁸

Given these different meanings attached to the concept of professional independence, there is also a different ethical value about how the two legal systems address attorney-client conflicts. In the U.S, the lawyer is considered the client’s agent.¹⁹ Thus, it is the client, upon the lawyer’s disclosure of the conflict, who has the option to elect to waive the conflict or not.²⁰ Although the CCBE Code of Conduct cautions against allowing a lawyer to take on

a representation when there is a conflict, the client has no ability to waive the conflict.²¹ In the civil law system, which values the lawyer’s sense of professional independence, the decision rests solely with the lawyer.²²

Confidentiality is another term that has different meanings depending on whether you are from a civil or common legal system. Both in civil and common law jurisdictions, the ethical rules about confidentiality between attorney and client are similar with narrowly defined exceptions.²³ In the common law ethics regime, confidentiality exists between attorney-client communications.²⁴ In contrast, in civil law ethics, the concept of “professional secret” is the umbrella term for confidentiality, attorney-client privilege and work product. This concept of professional secret is another example that highlights the importance of professional independence in civil law countries. The professional secret is deemed to be owned by society and cannot be waived by the client.²⁵

Confidentiality has a broader reach in civil law countries. According to civil law ethics, confidentiality is extended beyond communications between attorneys and clients, but also attaches to communication between attorney and attorney.²⁶ In part, this rationale for extending confidentiality to attorney/attorney communications is a continuation of the concept that the lawyer remains professionally independent from influence by his client and others.²⁷ Interestingly, the CCBE Code requires that in order for attorney/attorney communications to be confidential, the sender must designate the communication as such.²⁸

Some ethics scholars and commentators have said that these differences are theoretical and have called for the formulation of a global theory of ethics.²⁹

The International Bar Association Code of Ethics is one such attempt to harmonize the divergent ethical codes.³⁰ However, other ethics commentators, including this author, believe that a true global theory of ethics is aspirational and not readily achievable in any meaningful way. As we have discussed, there remain fundamental ethical differences that will not be eradicated with an international code of ethics.

A more realistic and prudent approach is for attorneys to learn to address these differences by trying to create culturally aligned dispute resolution forums that are respectful of all participants’ goals and values.³¹ As seasoned practitioners know all too well, negotiation, mediation, and arbitration each present their own cultural challenges. Fortunately, many international arbitrations are administered, and the ADR provider mediates the ongoing culturally driven differences that are inherent in structuring an international arbitration.³² However, negotiation and mediation are more fluid dispute resolution processes that lack formalistic procedures and structure. Such informality often magnifies the ideological cultural values and distinctions of each lawyer’s respective legal

system, as each attorney prefers her way. If you do not have a case manager or administrator, you should initiate a conversation with your international colleague about issues of confidentiality, conflicts and good lawyering. As we have discussed, it is prudent to avoid assumptions about commonality of legal practice.

Even the preference for selection of a dispute resolution forum might be a culturally determined choice. In the U.S., our confusion about why some of our civil law counterparts have not been as receptive to using mediation for resolving international commercial disputes may have a cultural basis. In one glaring example, the terms facilitated settlement, mediation, conciliation, and arbitration are often used interchangeably with different cultures using the same word to refer to totally different processes. However, this confusion actually reflects the cultural preferences for facilitated or directed dispute resolution processes. In another example, one commentator has suggested that the inherent cultural differences between legal systems explain the differences in receptivity to mediation.³³ In common law systems, state-authority and government interventions are viewed as encroachments on civil liberties. However, civil law countries are more likely to respect state and government interventions as a requisite duty to its people to preserve social values and services.³⁴ Civil law systems are organized by adhering to existing concepts of law, sometimes at the expense of changing to the evolving need of the people it serves. Thus, it is no surprise that the U.S. is more receptive to mediation than civil law countries.

Conclusion

Although we are finding that our world gets smaller and smaller, our globalized legal practice requires us to be more culturally attuned to our international brethren if we are to effectively engage in dispute resolution. Legal ethics are the embodiment of the cultural values of a legal system and its broader society. To fully appreciate the meaning of the ethical differences between us and our colleagues from civil law countries, we have to get beyond the actual written word and understand the context. The limited allocated space of this column forced me to distill a complex and nuanced topic in a few short pages. Yes, there remain many unanswered questions. Optimistically, I believe that awareness of the complexity of this topic, as with any cultural learning, makes for a good beginning.

Endnotes

1. Mary C. Daly, *The Ethical Implication of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT'L L.J.* 1239, 1240 (1997).
2. See generally GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY*, Stanford Univ. Press (2004); Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective 9* (American Bar Ass'n, CEELI Concept Paper, 2002).
3. Model Code of Prof'l Responsibility (2002).
4. CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS (Council of Bars and Law Societies of Europe 2010). The CCBE Code of Conduct offers global harmonization of the ethics rules of states of the European Union and European Economic Area. The purpose is to facilitate transnational legal practice when state ethical rules compete.
5. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 24 (3d ed. 2007).
6. See *id.* at 26.
7. See *id.* at 102.
8. See *id.*; see also Maya Goldstein Bolocan, *Professional Legal Ethics: A Comparative Perspective 4* (American Bar Ass'n, CEELI Concept Paper, 2002).
9. See also Bolocan, *supra* note 8, at 4.
10. *Id.* at 34.
11. See *id.* at 35.
12. *Id.* at 36.
13. HAZARD & DONDI, *supra* note 2, at 76.
14. See Bolocan, *supra* note 8, at 9.
15. See *id.*
16. See *id.* at 10.
17. See *id.* at 11.
18. See CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS Principle (a) (Council of Bars and Law Societies of Europe 2010), the independence of the lawyer, and the freedom of the lawyer to pursue the client's case.
19. See Model Code of Prof'l Responsibility R. 1.2 (2002).
20. See *id.* R. 1.7-1.9.
21. CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS 3.2 (Council of Bars and Law Societies of Europe 2010).
22. See Bolocan, *supra* note 8, at 43.
23. See *id.* at 35.
24. ABA Model Code Rule 1.6.
25. Mullerat, Ramon, *For A Global Code of Ethics*, *CHICAGO DAILY LAW BULLETIN*, July 7, 2010 (Volume 156, No. 131).
26. HAZARD & DONDI, *supra* note 2, at 211.
27. See Bolocan, *supra* note 8, at 36.
28. See *id.* at 36.
29. See Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 *LEGAL ETHICS* 29 (1999); Daly, *supra* note 1; Mullerat, *supra* note 25.
30. See INTERNATIONAL CODE OF ETHICS (Int'l Bar Ass'n 1988).
31. Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 *J. DISP. RESOL.* 289 (2005).
32. See, e.g., the International Chamber of Commerce in Paris.
33. See Nadja Alexander, *What's Law Got to Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdiction*, 13 *BOND L. REV.* 335, 345 (2002).
34. See *id.* at 355.

Elayne E. Greenberg, greenbee@stjohns.edu, is Director of the Hugh L. Carey Center at St. John's University School of Law and immediate past co-chair of the New York State Bar's Section of Dispute Resolution's Committee on Ethics.